Supreme Court of the United States

OCTOBER TERM, 1947

No. 272

MARY WALL KIRBY, ET AL., *Petitioners,*

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL., *Respondents*

MOTION FOR REHEARING

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully move the Court to set aside its order in this case of October 13, 1947, denying the writ of Certiorari, and to grant the relief sought, for the following reasons.

"Speaking frankly:" The result denying Petitioners their constitutional rights was unquestionably achieved by a false theory put forth in Respondents' answer, false because indisputably at variance with the facts of this case, erroneously assumed, and with the settled decisions of this Court applicable to the true facts.

This is why this counsel in over thirty-five years' practice before this court, files for the first time a motion for a rehearing.

The defense presented in Respondents' answer in actual fact or in law, has nothing to do with the issue presented by these Petitioners. The true fact in this case and the law governing it, are presented by Petitioners and the answer is a general denial of the jurisdiction of this Court.

I.

What Are the True Facts?

(1) The Constitution of Texas created an estate in Louisa Frazier and her husband in a homestead and prohibited the "owner, if a married man (to)sell the homestead without the consent of the wife, given in such manner as may be prescribed by law." It further prohibited the husband without such joinder to deed or mortgage it and declared that "all pretended sales of the homestead involving any condition of defeasance shall be void."

(2) The Texas Statute, Art. 4618, declares that "The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both." (Copied in Petition, p. 7-8)—also statute giving form of wife's necessary and indisputable consent thereto (p. 8). Thus was the title to the homestead estate invested equally in the husband and the wife, incapable of being divested by or against one alone.

(3) The Court of final resort of Texas, without a single dissent from its earliest to its latest decisions, has construed these constitutional and statutory laws—which are unam-

biguous and incapable of amendment or perversion by any court's construction against their plain language—to the effect that all attempts at divestiture of the family homestead by the husband alone are utterly void, both as to the wife and even as to the husband (Petition 6; 10-14). The Texas Supreme Court has also consistently held that what the husband was prohibited to do of his own volition, he could not do through the agency of another or of his wife who was denied the power of such agency, or forced to do by any court or other state agency.

The reason is, that there is not a word or inference in the Constitution or the Statutes that confers such power, agency or capacity upon the husband or court to do so. To do that prohibited thing as has been imputed here by the claimed and presumed construction of the highest Texas Court, is wholly arbitrary and without foundation. (See Petition, pp. 10 to 14, and Grounds One, p. 6, and Ground Two, p. 10, the statements and ruling being nowhere traversed or disputed by Respondents, except by "general denial.")

(4) Notwithstanding the Constitution and Statutes, and the uniform decisions of the court of last resort of Texas; notwithstanding the undisputed fact that Mrs. Frazier was invested with this estate under these laws, the court below held that her unquestioned title, interest and estate in this land, established by undisputed facts of record, was divested out of her by a judgment rendered against her husband alone without her presence and without her authority, in spite of the Fifth and Fourteenth provisions of the CONSTITUTION OF THE UNITED STATES.

That judgment under Texas law was as ineffective against her and that homestead as if rendered against William Smith, a total stranger. (See Petition, pp. 11-12.)

II.

The Decisions of the United States Supreme Court on This Issue

In Respondents' answer (p. 8), referring to two Texas cases (the LEWIS and the BERHENS cases) holding judgments against the husband alone void as to wife not a party, and also void as to husband himself, identical in facts with this case, our honorable adversary has stated: "Neither of which has the approval of the Supreme Court of Texas."

We regret to say counsel's statement is not correct. The true facts are given by Petitioners (p. 11 to p. 13, citing and quoting from the official reports contrary to that assertion).

Thereupon Respondents, citing and quoting from several of this Court's decisions, have laid down this proposition:

> "Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive."

Such decisions are, of course, correct on the facts there involved between parties legally present as parties before the court. But Petitioners have presented no such case here. We will let this Court answer counsel.

These identical decisions *eo nomine* were presented to this Court by the respondents in HANSBERRY v. LEE, 311 U.S. 32, 85 L. Ed. 22, a case identical with Petitioners' in fact and in law—on the issue here.

This Court, speaking through its late distinguished Chief Justice, thus declared the law:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose, and to at-

tribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a State court ascribing to the judgment of another court the binding force and effect of *res judicata* is challenged for want of due process, it becomes the duty of this court to examine the course of procedure in both litigations, to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Indemnity Ins. Co. v. Rupp, 225 U.S. 261.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party, or to which he has not been made a party by service of process (citing cases) * * * A judgment rendered under such circumstances is not entitled to the full faith and credit which the constitution and statutes of the United States * * * prescribe."

The fourth syllabus is as follows:

> "The enforcement of a judgment against the person or property of one not designated as a party, nor made a party by service of process, violates the due process clauses of the 5th and 14th amendments." (Id. p. 22.)

The accepted rule of statutory construction is thus stated:

> "Nothing is better settled than that, in the construction of the law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written." (U. S. v. STANDARD BREWERY, 251 U.S. 210.)

There is no ambiguity or uncertainty of meaning in the Constitution and the Statute concerning this matter. Nor is

there any uncertainty as to the uniform construction in exact harmony with the written law by the courts of last resort in Texas. The judgment in this case, therefore is arbitrary, unreasonable and condemned by the Constitution of the United States in Amendments 5 and 14.

See Notes and authorities cited in Vol. I, SUPREME COURT LAW" by HENNOLD, p. 542, etc.

Even in the case of JERGENS v. SCHIELE, 61 Texas 255, mainly relied upon by Respondents (see Answer in Supreme Court of Texas, p. 18; Answer in this Court, p. 6), the Supreme Court of the State directly held that the wife (Mrs. Jerkens) had the opportunity in the second suit where she was a party, to prove the facts as to her rights assumed to have been affected in the first suit against her husband, wherein she was not a party; the Court holding expressly that she had failed to produce any evidence showing that any right of hers had been affected by the former suit, and therefore denied her any relief.

Your Honors cannot consistently deny the constitutional rights of the Petitioners by refusing jurisdiction of this case on the assumption that there may have been non-federal grounds upon which the State Court may have entered a judgment, although the opinion expressly declined in the lower court to pass upon any question except the federal right here asserted.

It was decided by this Honorable Court in ANDERSON v. BRAND, 303 U.S. 95, 82 L. Ed. 685, in Syllabus 1, as follows:

> "Where a state court does not decide against a petitioner or appellant upon an independent state ground, but, deeming a federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, and the Supreme Court of the United States has jurisdiction to review the judgment, if it is a final judgment; and cannot refuse jurisdiction

because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground."

It is respectfully submitted that this motion should be granted, and the Writ of Certiorari prayed for in the petition be awarded. We pray for such relief.

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Certificate of Counsel

I, William D. Gordon, Attorney for the above named Petitioners, hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

I further certify that a copy of this petition or motion is contemporaneously furnished to the Honorable William Hamlet Blades, 915 Petroleum Building, Houston, Texas, Attorney for Respondents.

W. D. GORDON,
Counsel for Petitioners